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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.7

No. [redacted]130.

THE COSMOPOLITAN CLUB, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED OCTOBER 9, 1906.

(20,416.)

(20,416)

SUPREME COURT OF THE UNITED STATES

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IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

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1 In the Supreme Court of Appeals of the State of Virginia.

COMMONWEALTH OF VIRGINIA
vs.
COSMOPOLITAN SOCIAL CLUB.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, the Cosmopolitan Social Club of the City of Norfolk, would respectfully show unto the Court, that it is aggrieved by an order of said Court, entered on the 31st day of July, 1906, in the cause of Commonwealth *vs.* Cosmopolitan Social Club, in that said order refused to dismiss the complaint filed in said cause and adjudged that said Cosmopolitan Social Club had been conducted for the purpose of violating and evading the laws of the State of Virginia, regulating and licencing the sale of liquors and thereby forfeited the chartered rights and franchises of this petitioner.

Your petitioner respectfully submits that said order is erroneous, First—Because the act of the General Assembly of the State of Virginia, under which said order was entered, impinges the constitution of Virginia and the constitution of the United States, in that under its provisions, the courts of Virginia are vested with the power to annul and forfeit the charters of Social Clubs chartered under the provisions of Sec. 1145 of the Code of 1887 of Virginia, and Second—Because the evidence introduced by the Commonwealth of Virginia was plainly insufficient to sustain the judgment of the court.

2 In the case of Dartmouth College, 4th Wheaton, page 712, Chief Justice Marshall says:

"Any Act of the Legislature which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter. If the Legislature mean to claim such an authority, it must be reserved in the grant. The charter of Dartmouth College contains no such reservation; and I am therefore, bound to declair, that the acts of the Legislature of New Hampshire, now in question, do impair the obligations of that charter, and are, consequently, unconstitutional and void."

It has been repeatedly held that it is not necessary that the power of granting the charter, should reserve in said charter, the right to repeal or amend same, but that said right may be reserved in the constitution or by general law.

"The right to repeal or alter a charter may be conferred upon the state by a constitutional provision of general act of the Legislature, as well as by the express terms of the charter itself. A legislative enactment of this character establishes a rule of construction governing all future grants of charters. Every charter granted thereafter must be read as containing a reservation of the right to repeal

or alter it at pleasure, no express provision to this effect being required."

Morawitz on Private Corporations 188 2nd edition, Sec. 464.

Unless, therefore, the legislature, or the constitution of Virginia, reserved the right to repeal, alter or amend, charters similar to the one of your petitioner, at the time of the grant of this charter to your petitioner, any act of legislature of Virginia enacted subsequently to the granting of such charter or charters, which attempts to alter, repeal or amend such charters, is contrary to both the Constitution of Virginia and the Constitution of the United States, both of which constitutions, prohibit the passage of laws impairing the obligations of contracts.

The charter of your petitioner was granted by the Judge of the Corporation Court of the City of Norfolk, Virginia, on the 6th day of October, 1894, and therefore, prior to the adoption of the
3 present constitution, and, while the constitution of 1869 was in effect. An examination of which constitution disclosed the fact that such instrument does not reserve the right to repeal, alter or modify the charters of corporations.

It therefore, remains only to enquire whether there was on the 6th day of October, 1894, any general law enacted by the legislature of Virginia, which reserved the right to repeal, amend or modify the charter of your petitioner.

Your petitioner's charter was granted under Sec. 1145 of the duly enacted Code of Virginia of 1887. Between the enactment of the Code of 1887 and the grant of the charter to your petitioner, no laws were enacted by legislature of Virginia, reserving the right in said legislature to repeal, alter or amend charters. The law, therefore, controlling the subject is as written in said Code.

The Code of 1887, contains four provisions reserving to the Legislature the right to repeal and modify certain charters. Those sections are Sections 1069, 1143, 1173 and 1240.

Section 1069, provides that every act of incorporation passed by legislature, may after fifteen years be amended. This section does not apply to charters granted by the court, and, even if it did, the charter of your petitioner has not been in existence for fifteen years.

Section 1143, provides that the charters of mining and manufacturing companies may be altered, repealed or amended after fifteen years.

Section 1240, relates only to the charters of companies organized for internal improvements.

Section 1173, is the only section which could have any reference to the charter of your petitioner.

The Court is asked to particularly observe the language of Section 1173; it is as follows:

4 "The General Assembly reserves the right, at its pleasure, to repeal, alter or modify the charter of any bank, and the provisions of this chapter and chapter 47."

It will be observed that said section provides that the charter of

any bank may be repealed, altered or modified at the pleasure of the Legislature and that the *provisions* of this chapter (that is chapter 48) and chapter 47 may be, at the pleasure of the Legislature, repealed, altered or modified, but said section 1173 nowhere says, THAT CHARTERS GRANTED UNDER THE PROVISIONS OF SECTION 1145, MAY BE REPEALED, ALTERED OR MODIFIED. Chapter 47 of the Code contains numerous provisions with reference to the organization and operation of corporations, and amongst other provisions, it contains Sec. 1145.

It is thus apparent, that the Legislature reserved the right to repeal, alter or modify the charters of banks and the provisions of chapters 48 and 47, but nowhere is the right reserved of repealing, altering or modifying a charter similar to that of your petitioner granted under section 1145.

In entering the order complained of in this cause, the Court was proceeding under section 142 *on* an "Act to Amend an Act and Re-enact Section 142, of an Act of the General Assembly of Virginia entitled 'An Act to Amend and Re-enact Sections 75 to 147,' inclusive of an act approved April 16, 1903; and to provide how social clubs chartered since April 16, 1903, shall obtain licence to sell ardent spirits &c," which said acts were approved on March 12, 1904, and will be found in the Acts of 1904, at page 214.

It is submitted to the Court, that said Act, in so much as it attempts to repeal, alter or modify charters granted under section 1145, and not within the perview of sections 1069, 1143, 1173 and 1240, is contrary to the Constitutions both of the United States and of Virginia, and that therefore, the order complained of is null and void.

5 Apart from the question of the power of the Court to repeal, alter or modify petitioner's charter, it is submitted, that the action of the Court was not sustained by evidence.

The Commonwealth only introduced one witness, and this witness did not get a drink from the club. There is absolutely no proof that said Club was being run for the purpose of violating the liquor laws of the State of Virginia, or that any person ever got a drink at said club, save a Mr. Lyle, who held a card as a non-resident member, which card entitled him to the privileges of the club for thirty days.

There was no proof that said club was not a *bona fide* club, nor any attempt at such proof, nor is there any attempt at proof that said club was being run for the *purpose* of violating or evading the liquor laws of the State of Virginia, and, the Court, in order to maintain the judgment of the Corporation Court of the City of Norfolk, must hold that the mere fact that a social club extends its privileges to one or more non-residents who are the guests of a member of the club, with a thirty day membership card, is proof that said club was being run for the *purpose* of violating and evading the liquor laws of the State of Virginia.

This petitioner showed by uncontradicted testimony, that no one was allowed to get a drink in the club, save a member or the guest

of a member, having a visitor's card, and that said club is run strictly as a social club.

The witness for the Commonwealth, himself, proved that he was unable to get a drink in said club.

It is therefore submitted to the Court, that the evidence is entirely inadequate to sustain the judgment of the Corporation Court of the City of Norfolk.

For the reasons in this petition set out, your petitioner prays that it be granted a writ of error and supersedeas to said judg-
6 ment, and that said judgment be reviewed and reversed, and that said proceeding be dismissed.

And in duty bound, your petitioner will ever pray.

COSMOPOLITAN SOCIAL CLUB.
R. RANDOLPH HICKS, *Attorney.*

I, R. Randolph Hicks, a practicing attorney in the Supreme Court of Appeals of the State of Virginia, do hereby certify that in my opinion, the judgment of the Corporation Court of the City of Norfolk, complained of in the foregoing petition, should be reviewed and reversed.

R. RANDOLPH HICKS.

7 VIRGINIA:

In the Supreme Court of Appeals, held at the Court House thereof, in the City of Staunton, on Tuesday, the 18th day of September, 1906.

The petition of the Cosmopolitan Social Club of the City of Norfolk, for a writ of error and supersedeas to an order of the Corporation Court of the City of Norfolk, entered on the 31st day of July, 1906, in the cause then therein pending of the Commonwealth of Virginia against said Cosmopolitan Social Club, having been maturely considered and the transcript of the record of said order seen and inspected, the Court being of opinion that the said order is plainly right, doth refuse the writ of error and supersedeas prayed for.

A Copy,
Teste:

JOS. A. WADDELL, *Clerk,*
By A. W. MAY, *Deputy.*

8 VIRGINIA:

Pleas before the Corporation Court of the City of Norfolk at the Court House of said County on the 31st day of July, 1906.

COMMONWEALTH
vs.
COSMOPOLITAN CLUB.

This day came the parties by their attorneys and the defendant moved the Court to dismiss the complaint herein on the ground that

under the Constitution of Virginia, and of the United States, the Court has no power to entertain said complaint, and that the act under which said complaint is filed is contrary to said constitution, and the Court having maturely considered said motion and the evidence in support thereof, doth overrule said motion, to which action of the Court, the defendant excepted and thereupon the evidence of both the Commonwealth and defendant being heard, the Court doth adjudge that the said Corporation has been conducted for the purpose of violating and evading the laws of the State of Virginia, regulating the licencing and sale of liquors, to which ruling of the Court the defendant excepted and the defendant indicating an intention of appealing from the ruling of the Court, it is ordered that this judgment be suspended sixty days from the date of entry of this order.

Memorandum.

At the trial of this case, the defendant excepted to sundry rulings of the Court and tendered his bills of exceptions numbers 1 and 2, which were signed, sealed and made a part of the record.

Notice.

NORFOLK, VA., *June* 16, 1906.

To the Cosmopolitan Social Club, a corporation chartered as a social club under the laws of the State of Virginia :

9 Take notice that Chief of Police H. M. Boush having made complaint that the said corporation is being conducted and has been conducted for the purpose of violating and evading the laws of this state regulating the licencing and sale of liquors, the Corporation Court of the City of Norfolk or the Honorable Judge thereof in vacation at the Court House of said City, on Saturday the 30th day of June, 1906, at 10 A. M. will inquire into the truth of the said complaint.

JNO. G. TILTON,
Attorney for the Commonwealth of Va.
for the City of Norfolk.

Return.

Executed this the 16th day of June, A. D. 1906, by serving a copy hereof on W. J. Fentress Secretary of the Cosmopolitan Social Club, the said W. J. Fentress being in and a resident of the City of Norfolk at the time of such service where his place of business is.

J. F. LAWLER, *S'g't,*
By W. A. THOMPSON, *Deputy.*

The following are the bills of exceptions as referred to in the above order.

Memorandum.

1.

Be it remembered that on the calling of this case, the defendant appeared and introduced a certain copy of its charter of incorporation in words and figures following, (here insert charter) and moved the court to dismiss the complaint filed herein on the grounds that, (A) The Court was without jurisdiction to entertain same, because the statute under which said complaint was filed is in contravention first of the Constitution of Virginia, and second in contravention of the Constitution of the United States of America. (B) Because the Court was powerless under the Constitution of Virginia, and of the United States of America, to alter, repeal, amend or annul the chartered rights and franchises of said corporation, or to subject any person concerned in the violation or evasion of Section 142 of an Act of the Legislature of Virginia, entitled "An act to raise revenue for the support of the Government of Public Free Schools and to pay the interest on the public debt and to provide a special tax for persons as authorized by Section 189 of the Constitution," to the penalties prescribed therein which was approved April 16, 1903, which motion the Court overruled, to which ruling of the Court, the defendant, by counsel, excepted and tendered this his bill of exceptions Number 1, which was signed, sealed and made a part of the record.

10

ALLAN R. HANCKEL. [SEAL.]

Be it remembered that at the trial of this cause, the Commonwealth of Virginia, to sustain the issue on its part, introduced H. A. Davis, who testified as follows:

On the 8th of June, 1906, I entered through the club house of the Cosmopolitan Club with Mr. Lyle. I entered through an office and entered a room equipped as a bar; I asked for a drink of whiskey; the bar-keeper asked if I was a member of the Cosmopolitan Club; I answered no, and he refused to give me a drink said the man that made members was out. Mr. Lyle had a card to said club, which entitled him as a non-resident, to the privileges of the club for thirty days from June 1st, 1906; he asked for a drink, was given one for which he paid. Mr. Lyle then bought another drink, took it in the front office and gave it to me. I saw no rooms but the front office and the bar. I sent two men in two days after came out in few minutes with cards of membership, their names were Lyle, Ernhart.

11

This being all of the evidence introduced by the Commonwealth of Virginia, the defendant introduced Mr. Fentress, who testified as follows:

I was in charge of the Cosmopolitan Club on the night of June 8th, 1906. H. A. Davis came in with Mr. Lyle, asked for a drink, was refused. Mr. Lyle asked for a drink, and got it and paid for it as he had a visitor's card which entitled him to the privileges of the club. No one is allowed to get anything to drink in the club but members and the guests of members having cards similar to the

one held by Mr. Lyle. I did not see Davis take a drink. I am President of the Club, and gave the drink to Mr. Lyle, we originally had one thousand membership cards, have about 500 left.

The receipts about equal the expenditures.

The Defendant then introduced the charter of incorporation which was the charter set out in the bill of Exceptions Number 1, to which reference is hereby made, which is made a part hereof as fully as if again herein set out, and the by-laws of the said corporation, which are as follows: (here insert by-laws of Corporation).

This being all the evidence introduced, the Court was of opinion that said club had been conducted for the purpose of violating the laws regulating the licencing and sale of liquors, to which ruling of the Court the defendant excepted as contrary to the law and the evidence and tendered this his bill of exceptions Number 2, and prayed that the same be signed sealed and made a part of the record, which was accordingly done.

ALLAN R. HANCKEL. [SEAL.]

12 The following is a copy of the charter referred to in the bill of exceptions:

Charter of the "Cosmopolitan Club."

To the Honorable D. Tucker Brooke, judge of the corporation court of the city of Norfolk:

The undersigned persons, who desire to form a joint stock Company for the conduct of the business or enterprise hereinafter set forth, do respectfully present the following certificate, and ask that a charter of incorporation be granted them, on the terms therein set forth—

I. The name of the Company to be the "Cosmopolitan Club."

II. The purpose for which the said Company is formed is to promote social intercourse, athletics and physical culture, and to encourage all manly sports: with the power to purchase, hold and dispose of real and personal property to build and make improvements on its property and to do anything of any other description that may come within the legitimate scope of its business.

III. The capital stock of the said Company shall not be less than Five Hundred Dollars ($500.00) nor more than three thousand dollars ($3000.00) to be divided into shares of the par value of Ten Dollars ($10.00) each.

IV. The said company to be allowed to purchase, hold or lease such real estate in the city of Norfolk as shall or may be required for the purposes of the said club, not to exceed the sum of three thousand dollars ($3000.00).

V. The principal office of the said company shall be in the City of Norfolk, in the state of Virginia, and the chief business of said company shall be to carry out the purposes and objects of its organization, as detailed in article Two

VI. The officers of the said Company shall be President, Vice President, Secretary and Treasurer and a board of governors

and directors. And the said company shall have the power
13 to employ such clerks or other employers as may be deemed expedient.

The President, Vice-President, Secretary, and Treasurer shall be elected for a term of one year, and to hold office until their successors are elected and qualified.

The board of directors shall consist of six members (6) to be composed of the President, Vice-President, Secretary and Treasurer *ex officio*, and three other members who are stockholders. The names of the officers, who for the first year shall manage the affairs of the company are as follows, all of whom reside in the City of Norfolk.

President, E. L. Mason, Vice-President, Charles Wilkerson, Secretary and Treasurer H. Parozo. Board of Directors: consisting of the three preceding *ex officio* and Walter L. Corprew, Wm. Youngling and Edward Potticary.

Given under our hands at Norfolk, Virginia, this fifth day of October, in the year 1894.

GEO. W. DEANS.
his
CHARLES x WILKERSON.
mark.
E. L. MASON.
W. YOUNGLING.
ED. POTTICARY.
WALTER L. CORPREW.

STATE OF VIRGINIA, *City of Norfolk, To wit:*

I, Laurence Waring, a notary public in and for the Corporation aforesaid in the State of Virginia, do hereby certify that George W. Deans, Charles Wilkerson, E. L. Mason, W. Youngling, Edward Potticary and Walter L. Corprew whose names are signed to the foregoing certificate personally appeared before me and acknowledged the same to be their act and deed in my corporation aforesaid.

14 Given under my hand this 5th day of October, 1904.

LAURENCE WARING,
Notary Public.

"*Charter of the Cosmopolitan Club.*"

VIRGINIA, *City of Norfolk, To wit:*

Upon the application of the parties hereinafter set forth and mentioned, made in accordance with the statute in such case made and provided, duly signed and acknowledged before a Notary Public as the law directs and prescribes to the Corporation Court of the City of Norfolk. This charter of incorporation is hereby granted on the terms herein set forth to the said persons as follows: E. L. Mason, C. Wilkerson, Geo. W. Deans, H. L. Corprew, Wm. Youngling and Edward Potticary and they and their associates and successors are hereby constituted a body politic and corporate under

the name of the "Cosmopolitan Club" and the said company is hereby invested with all the powers, rights and privileges pertaining to incorporated companies under the laws of the state of Virginia, and subject to all the penalties and restrictions now imposed or that may hereafter be imposed by law upon such bodies.

The said company shall pay all taxes, debts and demands due the State of Virginia by it in current money of the United States and not in coupons.

II. The purpose- for which the said company is formed are to promote social intercourse, athletic and physical culture, and to encourage all manly sports: and the said company to that end, shall have the right to purchase, hold, lease and dispose of real estate and personal property, to build and make improvements on its property, and to do anything of any other description that may come within the legitimate scope of its business.

III. The capital stock of said company shall not be less than Fife Hundred Dollars ($500.00) nor more than ($3000.00) three thousand dollars, to be divided into shares of the par value of Ten dollars ($10.00) each.

IV. The said company shall have the power to purchase, hold or lease such real estate in the City of Norfolk, as shall or may be required for its purposes, not to exceed three thousand dollars ($3000.00) in value.

V. The principal office of the said company shall be in the city of Norfolk, in the State of Virginia, and the chief business of the said Company shall be to carry out the purposes and objects of its organization, as detailed in article Two.

VI. The officers of said company shall be a President, Vice President, Secretary and Treasurer, and a Board of Governors or directors, and such officers as may be necessary. And the said company shall have the power to employ such clerks and other employers as may be deemed expedient. The President, Vice President Secretary and Treasurer to hold office for a term of one year and until their successors are elected and qualified. The board of directors shall consist of six (6) members, to be composed of the President, Vice President Secretary and Treasurer, *ex officio*, and three (3) other stockholders. The names of the officers, who for the first year shall manage the affairs of the company, are as follows, all of whom reside in the City of Norfolk, Virginia: President, E. L. Mason, Vice President Chas. Wilkerson, Secretary and Treasurer, H. Parozo, Board of Directors consisting of three (3) Preceeding officers, *ex officio* and Walter Corprew, Wm. Youngling and Edward Potticary.

Given under my hand this 6th day of October, in the year 1904.

D. TUCKER BROOKE,
Judge of the Corporation Court of the City of Norfolk, Va.

VIRGINIA:

In the Clerk's Office of the Corporation Court of the City of Norfolk, on the 6th day of October, 1894. The foregoing charter of

Incorporation of the "Cosmopolitan Club" was this day received and duly recorded and is hereby certified to the Secretary of the Commonwealth for record in his office according to law.

Teste: L. ROYSTER, *Clerk.*

The following is a copy of the By-laws reverred to in the Bill of Exceptions:

Copy.

By-Laws of the Cosmopolitan Club.

Article 1.

The name of the association shall be the Cosmopolitan Club.

Article 2.

None but men over the age of twenty-one years shall be admitted to membership.

Article 3.

The officers of this club shall be a President, a Vice President, a Secretary and Treasurer and a Board of Directors of whom the President, Vice President and the Secretary and Treasurer shall be three and two members elected from the club at large.

Article 4.

The President shall preside at all meetings both regular and called and shall exercise general supervision over the affairs of the club.

17 Article 5.

The duties of the Vice President shall be to exercise all the powers of the President during the absence of the President.

Article 6.

The duties of the Secretary shall be to attend to all the meetings of the Club, to koep the books of the Club, and to receive and pay out all monies of the club, keeping a record of the same and to do any and all things that are required of him by the Board of Directors.

Article 7.

It shall be the duty of the Board of Directors to have entire supervision over the affairs of the club, to hire and discharge servants and to enter into contracts for the club.

Article 8.

All officers of the club shall be elected at the annual meeting of the club and shall serve for one year unless removed or resign. Their successors may be elected at any regular or called meeting.

Article 9.

Alll applications for membership shall be acted upon by an Executive Committee consisting of President, Vice President and Secretary-Treasurer, a negative vote of either one of whom shall be sufficient to exclude the applicant. This Committee shall be known as Committee on Membership and it shall report its action at each monthly meeting of the club.

Article 10.

Members thirty days in arrears for dues shall be dropped from the rolls without further notice unless further indulged by the Board of Directors.

Article 11.

The entrance fee shall be ten cents and the dues shall be ten cents per month.

18

Article 12.

The club shall hold meetings once per year for the transaction of any business that may come before it, for the election of officers and the receiving of their reports and once every month for the ratification of the election of members by the Committee on Membership, receiwing of officers' reports and any other business that may properly come before said meeting. A called meeting may be held at any time on call of the President or on call of at least five members in writing.

Article 13.

No members shall remove any book or papers from the club under any circumstances.

Article 14.

These by-laws may be added to, amended or altered at any regular or called meeting by a majority vote of the members present.

A Correct Copy.

W. J. FENTON, *President.*
W. M. ADKINS,
Sec'y & Treas.

VIRGINIA:

In the Clerk's Office of the Corporation Court of the City of Norfolk, on the 24th day of August, 1906.

I, James V. Treby, Clerk of the said Corporation Court of the City of Norfolk, do hereby certify that the foregoing and annexed is a true transcript of the record in the suit of Commonwealth *vs.* Cosmopolitan Club lately pending in said Court.

I further certify that the said copy was not made up and com-

pleted until the Plaintiff had had due notice of the making of the same and the intention of the defendant to take an appeal therein.

Given under my hand this 24th day of August, 1906.

JAMES V. TREHY, *Clerk*,
By J. J. HENNELLY, *D. C.*

Fee for record, $5.00.

19 VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals *of* the City of Staunton, on Monday, the 24th day of September, 1906.

I, Jos. A. Waddell, Clerk of the said Supreme Court of Appeals of Virginia at Staunton, do hereby certify that the foregoing is a true, full and complete transcript of the record *of* in the suit of the Cosmopolitan Social Club, Plaintiff in Error against the Commonwealth of Virginia, Defendant in Error.

Given under my hand and seal of said Court at Staunton, this the 24th day of September, 1906.

[Seal Supreme Court of Appeals of Virginia, Staunton.]

JOS. A. WADDELL, *Clerk*.
By A. W. MAY, *Deputy*.

Fee for transcript $10.00—paid by Pl'ff in Error.

STATE OF VIRGINIA, *City of Staunton, to-wit:*

I, James Keith, one of the judges and President of the Supreme Court of Appeals of Virginia, do hereby certify that the attestation of the above record of Cosmopolitan Club *vs.* Commonwealth remaining in the Clerk's Office of said Court at Staunton, Virginia, made by Joseph A. Waddell, the Clerk of said Court at Staunton aforesaid is in due form.

Given under my hand and seal this 26th day of September, 1906.

JAMES KEITH. [SEAL.]

20 Supreme Court of Appeals of the State of Virginia.

COMMONWEALTH OF VIRGINIA, Plaintiff,
vs.
COSMOPOLITAN CLUB, Defendant.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court of Appeals of Virginia, in refusing a writ of error to a judgment of the Corporation Court of the City of Norfolk, Virginia, against it in the above entitled case, it hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States. Assignment of errors herewith.

R. RANDOLPH HICKS,
Attorney for Cosmopolitan Club.

STATE OF VIRGINIA:

Supreme Court of Appeals.

Let the writ of error issue upon the execution of a bond by the Cosmopolitan Club to the Commonwealth of Virginia, in the sum of five hundred dollars, said bond when approved to act as a supersedeas to the judgment of the Corporation Court of the City of Norfolk, entered in this case on the 31st day of July 1906. Dated this 24 day of September 1906.

JAMES KEITH,
President of Supreme Court of Appeals of State of Virginia.

[Endorsed:] Commonwealth of Virginia *vs.* Cosmopolitan Club. Petition for writ of error.

21 Supreme Court of Appeals of the State of Virginia.

COMMONWEALTH OF VIRGINIA, Plaintiff,
vs.
COSMOPOLITAN CLUB, Defendant.

Assignment of Error.

Now comes the above defendant and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

The Corporation Court of the City of Norfolk in the State of Virginia, erred in holding and deciding that Clause 3, of Section 142 of and act of the General Assembly of Virginia, approved March 12th 1904, entitled "An Act to amend and re-enact sections seventy-five to one hundred and forty-seven, inclusive, of an act approved April 16th, 1903, and to provide how social clubs chartered since April 16th 1903, shall obtain licenses to sell ardent spirits etc.," was valid and this judgment of the Corporation Court of the City of Norfolk, Virginia, was affirmed by the Supreme Court of Appeals of Virginia, by its refusal to grant a writ of error to said judgment and by said refusal to grant said writ, the Supreme Court of Appeals of Virginia erred in holding and deciding that Clause 3, of Section 142 of an act of the General Assembly of Virginia, approved March 12th, 1904, entitled "An Act to amend and re-enact sections seventy-

22 five to one hun- and forty-seven, inclusive, of an act approved April 16th, 1903, and to provide how social clubs chartered since April 16th, 1903, shall obtain licenses to sell ardent spirits etc.," was valid. The validity of said clause of said section was denied and drawn in question by the defendant, on the ground of its being repugnant to the constitution of the United States and in contrevention thereof.

Said errors are more particularly set forth as follows:

The Supreme Court of Appeals of the State of Virginia erred in holding and deciding that said clause 3, of said section 142, did not impair the obligation of a contract,—contrary to the provisions of the Federal constitution, Art. 1, Section 10, for which errors defendant prays that the judgment of the Supreme Court of Appeals of Virginia dated the 20th day of September 1906, be reversed and a judgment entered for the defendant the Cosmopolitan Club.

R. RANDOLPH HICKS,
Attorney for the Cosmopolitan Club.

[Endorsed:] Commonwealth of Virginia *vs.* Cosmopolitan Club. Assignment of error.

23 Supreme Court of the United States.

COSMOPOLITAN CLUB, Plaintiff,
vs.
COMMONWEALTH OF VIRGINIA, Defendant.

Bond.

Know all men by these presents, That we, the Cosmopolitan Club as principal and Atlantic Trust & Deposit Co., Norfolk, as surety, are held and firmly bound jointly, unto the Commonwealth of Virginia in the sum of Five Hundred Dollars, to be paid to said Commonwealth of Virginia, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 24 day of September, 1906.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the case of Commonwealth of Virginia *vs.* Cosmopolitan Club, by the Corporation Court of the City of Norfolk, Virginia, which judgment was affirmed by the refusal of the Supreme Court of Appeals of Virginia, to grant a writ of error
24 thereto.

Now, therefore, The condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

Witness the signature and seal of the Cosmopolitan Club.

[Seal Cosmopolitan Club, Norfolk. Chartered Oct. 6, 1894.]

COSMOPOLITAN CLUB.
W. J. FENTRESS, *President.*

W. M. ADKINS, *Secretary.*

Witness the signature of The Atlantic Trust & Deposit Company by its President and the seal of *said* attested by its Assistant Secretary.

[Seal Atlantic Trust & Deposit Company. Incorporated 1902, Norfolk, Va.]

ATLANTIC TRUST & DEPOSIT CO.,
By A. G. KRIEL, *Its President.*

Attest:
R. S. BORMAN, *Ass't Sec'y.*

The above bond is approved.

JAMES KEITH,
President of the Supreme Court of Appeals of the State of Virginia.

The original of the foregoing supersedeas bond was lodged with the clerk of the Supreme Court of Appeals of Virginia on September 24, 1906, and the following endorsement made thereon: Bond filed September 24, 1906.

JOS. A. WADDELL, *Clerk,*
Clerk of the Supreme Court of Appeals of Va. at Staunton.
By A. W. MAY, *D. C.*

25 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Supreme Court of Appeals of Virginia:

Because in the records and proceedings, as also the rendition of a judgment in a plea which is in the said Supreme Court of Appeals of Virginia, before you, on applications for writ of error to a judgment of the Corporation Court of the City of Norfolk, Virginia, at the July term 1906 thereof, between the Commonwealth of Virginia, plaintiff, *versus* the Cosmopolitan Club a corporation, defendant, a manifest error has happened, to the great damage of the said defendant the Cosmopolitan Club, to which judgment, the Supreme Court of Appeals of the State of Virginia, subsequently, to wit, on the 29th day of September 1906, refused a writ of error, thereby affirming said judgment of said Corporation Court of the City of Norfolk, Virginia.

We being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court on or before thirty days from date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court

may cause further to be done therein to correct that error,
26 what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of September 1906. Done in the City of Richmond, with the seal of the Circuit Court of the United States for the Eastern District of Virginia, attached.

[Seal United States Circuit Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

Allowed.
JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

Writ of error. Filed Sep. 25, 1906.

The original of the foregoing writ of error was lodged with the Clerk of the Supreme Court of Appeals of Virginia on September 25, 1906, and also at the same time and place a copy thereof for the Commonwealth of Virginia. The following endorsement was made upon said original writ and upon the copy: Writ of error filed September 25, 1906.

JOS. A. WADDELL, *Clerk*,
Clerk of the Supreme Court of Appeals of Virginia, at Staunton,
By A. W. MAY, *Deputy*.

[Endorsed:] Commonwealth of Virginia *vs.* Cosmopolitan Club. Writ of error.

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Virginia, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Appeals of Virginia, wherein the Cosmopolitan Club is plaintiff in error and you defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the President of the Supreme Court of Appeals of the State of Virginia, this 25 day of September 1906.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

Attest:
JOS. A. WADDELL,
Clerk of the Supreme Court of Appeals of Virginia,
By A. W. MAY, *D. C.*

RICHMOND, VIRGINIA, ——, 1906.

I, W. A. Anderson, Attorney General of the State of Virginia, hereby acknowledge due service of the above citation and enter and appearance in the Supreme Court of the United States.

WILLIAM A. ANDERSON,
Attorney General.

28 UNITED STATES OF AMERICA, *ss:*

Supreme Court of Appeals of Virginia.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case with all things concerning same.

In witness whereof I have hereunto subscribed my name and affixed the Seal of the Supreme Court of Appeals in the City of Staunton, this 25th day of September, 1906.

[Seal Supreme Court of Appeals of Virginia, Staunton.]

JOS. A. WADDELL,
Clerk of the Supreme Court of Appeals of Virginia,
at Staunton,
By A. W. MAY, *Deputy.*

Endorsed on cover: File No. 20,416. Virginia supreme court of appeals. Term No. 451. The Cosmopolitan Club, plaintiff in error, *vs.* The Commonwealth of Virginia. Filed October 9th, 1906. File No. 20,416.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1907.

No. 130.

COSMOPOLITAN SOCIAL CLUB,

Plaintiff in Error,

vs.

COMMONWEALTH OF VIRGINIA,

Defendant in Error.

REPLY BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

I.

Appellant does not deny that the state through its appropriate tribunal may annul the charter and franchises of a corporation for non-use or mis-use of its franchises, but the annulment can only be for abuse of a franchise granted in the charter. The theory on which this power is reserved in the state, is that, when a state grants a franchise, there is an im-

plied condition that the franchise shall be used and shall not be abused. In event of a breach of this implied condition, the franchise may be avoided. But the franchise must be granted in the charter or in some amendment thereof, in order that its misuse may occasion a forfeiture.

> "The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created, were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the state, in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence."
>
> *Chicago Life Ins. Co. v. Needles,* 113 *U. S. p.* 580.

In the case at bar, appellant's charter does not give it the right to sell intoxicating liquors, therefore, a sale by it can be neither a mis-use or non-use of the original franchise granted in its charter. This being true, while the state of Virginia may punish the club, its officers and members for violation of the laws regulating the sale of intoxicating liquors, it can not punish it or them by abrogating the contract existing between the corporation and the state.

Examination of the authorities cited in the brief of the Attorney General, discloses that in each instance there cited, the corporation whose charter was forfeited, was guilty of mis-user or non-user of some essential franchise granted in its charter. "It may be affirmed as a general principal that where there has been a mis-user or non-user in regard to the essence of a contract between a corporation and the state,"

there may be a forfeiture but not otherwise. See 2nd Morowitz on Corporations, Sec. 1024.

> "It is only for a violation of an express provision of the organic law under which a corporation derives its powers or privileges, or for such a mis–use or non–use of them as results in a substantial failure to fulfill the design and purpose of its organization, that a forfeiture of a franchise will be decreed."
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> *Illinois Trust & Savings Bank v. Doud,* 105 *Fed., p.* 129.
> Dec. Circuit Court Appeals, 8 Circuit.

"While an information in the nature of a quo warranto is generally recognized as the appropriate proceeding for testing the right to exercise corporate franchises, and as the proper corrective for mis-user or non–user or abuse of corporate franchises, it is not for the commission of every act ultra vires that a charter will be declared forfeited. *The abuse must be wilful, continued and relate to the essence of some franchise granted.*" (Italics ours).

> *State v. Southern Building & Loan Asso,* 132 *Ala. p.* 50; 318 *Va. Reporter, p.* 376.
> *See note,* 8 *Am. St. Rept.,* 180.

> "But if there was such a restriction upon their power to contract as is contained in most other Bank charters, it is a case where the contract itself is void for the want of powers, but the attempt to do what they are unable to do, does not destroy their power of doing what they lawfully can do."
>
> *State of Ohio v. Commercial Bank,* 10*th Ohio p.* 541.

II.

It is not disputed that the states have the authority to regulate and control the manufacture and sale of ardent spirits within their respective limits.

III.

It is not contended that the charter of the Cosmopolitan Social Club authorized it to sell whiskey nor did it give it the right to violate the civil or criminal laws of the state of Virginia, or make it immune from punishment for such violation, nor is it contended that said corporation is superior to or independent of the law. It is merely contended that the charter of such corporation can not be forfeited by the state for a misdemeanor any more than the state could violate any other contract in which it might enter if it discovered that the other contracting party was guilty of misdemeanor or other offense not growing out of its contract.

IV.

In the case of the State of Maryland v. Eastern Literary and Musical Club, 73rd Md., p. 97, the question of the impairment of the contract was not before the court, and the case furnishes no aid to the solution of the question involved in this case.

V.

A federal question is involved in the case at bar, because the adjudication by the state court of Virginia that under Chapter 142 of the Acts of the Virginia legislature it can annul appellant's charter necessarily involves the adjudication of the claim by the appellant that the statute is in derogation of the constitution.

"If the statutes upon the authority of which alone

the auditor of the state proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States, has been withheld or denied by the judgment below. And our jurisdiction is not defeated, because it may appear, upon examination of this federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground of a federal nature must, therefore, be denied."

Chicago Life Ins. Co. v. Needles, 113 *U. S. p.* 579.

R. RANDOLPH HICKS.

Attorney for the Cosmopolitan Social Club.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 451.

COSMOPOLITAN SOCIAL CLUB,

Plaintiff in Error.

v.

COMMONWEALTH OF VIRGINIA,

Defendant in Error.

STATEMENT OF THE CASE.

The Cosmopolitan Club, plaintiff in error, was on the 6th day of October, 1894, granted a charter of incorporation by the Honorable D. Tucker Brooke, Judge of the Corporation Court of the City of Norfolk, Virginia, pursuant to Section 1145 of Chapter 47, of the Code of Virginia, which section is in the following language:

> "Any five or more persons, who shall desire to form a joint stock company for the conduct of any enterprise or business, which may be lawfully conducted by an individual, or by a body politic or corporate, except to construct a turnpike to be constructed beyond the limits of the county, or a railroad or canal, or to establish a bank of circulation, may make, sign, and acknowledge before any justice or notary, or county or corporation judge, or clerk of a county, corporation, or circuit court, a certificate in writing, setting forth the name of the company the purposes for which it is formed, the capital stock, and its division into shares, the amount of real estate pro-

posed to be held by it, the place at which its principal office is to be kept, the chief business to be transacted, and the names and residences of the officers who for the first year are to manage the affairs of the company. This certificate may be presented to the circuit court of the county, or the circuit or corporation court of the corporation, wherein the principal office of the company is to be located, or to the judge thereof in vacation. The said court or judge in vacation shall have a discretion to grant or refuse to said persons a charter of incoporation upon the terms set forth in the said certificate or grant it upon such other terms as may be adjudged reasonable. If the charter be granted, it shall be recorded by the clerk of the said court, in a book to be provided and kept for the purpose, and shall be certified by him to the Secretary of the Commonwealth, to be in like manner recorded in his office. Any charter, heretofore or hereafter granted to a company under the provisions of this section by a court or judge thereof in vacation, may alter or amend, or the corporate name of the company be changed, by the said court or the judge in vacation, on the application of the company authorized by a majority of the stockholders in general meeting. And any charter heretofore or hereafter granted by the General Assembly, which under the provisions of this section might have been granted by a court or judge, may in like manner and on like application, be altered or amended, or the corporate name of the company changed, by the circuit court of the county, or circuit or corporation court of the corporation, wherein the principal office of the company is, or by the judge of such court in vacation. Such alteration, amendment, or change shall be recorded by said clerk, and in the office of the Secretary of the Commonwealth, as hereinbefore provided for recording charters, and shall be as effectual and legal, from that time, as if originally a part of said charter. But nothing contained in this section shall be held or construed as denying to any building fund association, which has heretofore been organized and incorporated under the act of May twenty-ninth, eighteen hundred and fifty-two, and amendatory acts, all the right, powers, privileges, and franchises granted to and vested

in such associations under said acts. And it shall not be lawful for the General Assembly to grant relief, or to incoporate any company, or to alter or amend the charter of any corporation, provision for which is made in this section, unless application shall have been first made to such circuit or corporation court, or the judge thereof in vacation, and refused."

On the 16th day of June, 1906, John G. Tilton, Attorney for the Commonwealth of Virginia, for the City of Norfolk, served notice on the Cosmopolitan Social Club to the effect that complaint had been made that said club was being conducted for the purpose of violating and evading the laws of the State of Virginia regulating the licensing and the sale of liquors and requiring said club to appear before the Corporation Court of the City of Norfolk, on Saturday, the thirtieth of June, 1906, when the court would enquire into the truth of said complaint; (see record, page 5). This notice was served pursuant to section 142, chapter 116, of the Acts of the General Assembly of Virginia, 1904, page 215, which is as follows:

"Be it enacted by the General Assembly of Virginia, That section one hundred and forty-two of an act of the General Assembly of Virginia, entitled 'an act to amend and re-enact sections seventy-five to one hundred and forty-seven, inclusive, of an act approved April sixteenth, nineteen hundred and three, entitled an act to raise revenue for the support of the government and public free schools, and to pay the interest on the public debt, and provide a special tax for pensions, as authorized by section one hundred eighty-nine of the Constitution, approved February ...., nineteen hundred and four, be amended and re-enacted so as to read as follows:

" 'Any corporation chartered and organized as a social club before the sixteenth day of April, nineteen hundred and three, not then subject to the license laws of this State, which shall desire to keep on hand at its club house or other place of meeting wines, ardent spirits, malt liquors, or any mixture thereof, alcoholic bitters or bitters

containing alcohol, or fruits preserved in ardent spirits, to be sold, directly or indirectly, or given away to the members of such corporation, shall, on or before the thirtieth day of April in each year, pay to the treasurer of the county or corporation wherein the club house or other place of meeting of such corporation is located, a tax equal to two dollars for every person who has been a member of such corporation during the preceding year, but the tax shall be one-half of said amount when malt liquors only are sold or given away at such club, provided, the license tax to the State shall not in any case exceed three hundred and fifty dollars. Unless and until the said tax has been paid any person concerned in keeping such wines, ardent spirits, malt liquors or any mixture thereof, alcoholic bitters, bitters containing alcohol, or fruit preserved in ardent spirits, and selling, directly or indirectly or giving away the same, or any part of the same, to any member or members of such corporation, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than twenty dollars or imprisoned in jail not more than six months, or both.

" 'Any corporation chartered and organized as a social club, and paying the tax above described, shall be entitled to distribute and dispense wines, ardent spirits, malt liquors or any mixture thereof, alcoholic bitters or bitters containing alcohol, or fruit preserved in ardent spirits, or malt liquors only, as the case may be, to and among its members, without obtaining any license or paying any other further tax, either State, municipal, or county, for the said privilege than is above described; provided, that the said corporation is organized and conducted as a bona fide social club; and provided, further, that no person or corporation shall be entitled by the payment of the tax above prescribed to conduct the business of a wholesale or retail liquor dealer for which a license is required under the existing laws of the State; provided, however, no such club shall hereafter be permitted or chartered in any county or district where local option prevails.

" 'Upon complaint from any person that any such corporation so chartered as a social club is being conducted, or has been conducted, for the purpose of violating or

evading the laws of this State regulating the licensing and sale of such liquors, and after service of such complaint on such corporation at least ten days before the hearing of said complaint, the circuit court of the county or the corporation court of the city wherein is located its place of business or meeting, or the judge thereof in vacation, shall inquire into the truth of said complaint; and if the court, or judge in vacation, shall adjudge that the said corporation is being conducted, or has been conducted, for the purpose of violating or evading the laws of the State regulating the licensing and sale of liquors, the chartered rights and franchises of said corporation shall cease and be void without any further proceedings, and the said corporation and all persons concerned in the violation or evasion of said law shall be subject to the penalties prescribed herein.

" 'No corporation chartered and organized as a social club shall be entitled to the privileges of this act unless annually, on the first day of the term of the circuit court of the county before and nearest to the month of April for each year, and on the first day of the April term of the corporation court of the city wherein such club is, the president or secretary of such club shall exhibit in open court a list of the active members of such club on that day, and shall satisfy the court that such membership exceeds thirty bona fide members, and that such organization is a bona fide social club and not an organization created or conducted for the purpose of violating or evading the laws of this State regulating and licensing and sale of liquors; and the word 'members' wherever used in this act shall not apply to any person under the age of twenty-one year.' "

Appellant appeared pursuant to the notice and moved the court to dismiss the complaint on the ground that the act upon which it was founded was contrary to both the Constitution of Virginia and of the United States, but the court overruled this motion and, after hearing the evidence produced by the Commonwealth, entered an order, the effect of which was to annul and avoid the charter of appellant without further

proceeding. (Record, page 5). Subsequently to the entry of the judgment by the Corporation Court of the City of Norfolk, appellant petitioned the Supreme Court of Appeals of Virginia for writ of error, which writ was denied, and thereupon appellant sued out its writ of error to this Court.

ASSIGNMENT OF ERROR.

It is contended that the judgment of the Supreme Court of Appeals of Virginia in refusing a writ of error to the judgment of the Corporation Court of the City of Norfolk, Virginia, and thereby affirming said judgment, was erroneous and should be reversed as impairing the obligation of the contract between the Cosmopolitan Social Club and the State of Virginia, as evidenced by appellant's charter of incorporation and, therefore, impinging article one, section ten of the Constitution of the United States.

ARGUMENT.

Since the decision of the case of Dartmouth College v. Woodward, IV, Wheaton, page 518, this court has uniformly held that charters of incorporation are within the protection of the provision of the Constitution of the United States, prohibiting the passage of laws impairing the obligations of contracts. In that case, Chief Justice Marshall said: "Any act of the Legislature which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter. If the Legislature mean to claim such an authority, it must be reserved in the grant."

The judgment complained of, annulled the charter of appellant, and unless the State of Virginia retained the right, by some constitutional provision or Legislative act, of repealing, forfeiting or modifying the charter of appellant the judgment is erroneous. The constitution in effect in Virginia on the date

of the granting of appellant's charter contained no such reservation, though such a provision does appear in the Constitution of Virginia adopted in the year 1903, and which is now in force. The only acts of the Legislature of Virginia, in force at the time of the granting of appellant's charter, which reserve the right of repeal, forfeiture and amendment to the State were sections 1069, 1143, 1240, and 1173, of the Code of Virginia of 1887, which sections are as follows:

1069—Every act of incorporation (not within the operaof section twelve hundred and forty), passed by the General Assembly, unless it be otherwise expressly provided in the act, may, after fifteen years from its passage, be amended, altered, or repealed by the Assembly in like manner as if the right to amend, alter, or repeal the same had been expressly reserved in such act of incorporation.

1143—The act of incorporation of every such company for manufacturing or mining shall be in force for thirty years from the passage thereof, and no longer, and may, at any time after fifteen years from the organization of the company, be amended or repealed, at the pleasure of the General Assembly. Any such act of incorporation heretofore passed, which the General Assembly now has or may hereafter have power to amend, shall be deemed to be amended by this chapter now or whenever such power shall exist.

1240—The charter of every company which is governed by the act passed on the eleventh day of March, eighteen hundred and thirty-seven, prescribing certain general regulations for the incorporation of railroad companies, and of every company heretofore or hereafter incorporated, which shall be governed by this chapter, may be altered, modified, or repealed by any future legislature as may seem to it proper, except that no law shall be passed for taking from a company its work or property without making to it just compensation, or for changing its tolls without its assent, in any

other cases than such as are specially provided for in this chapter.

1173—The General Assembly reserves the right at its pleasure, to repeal, alter, or modify the charter of any bank, and the provisions of this chapter and chapter forty-seven.

It will be observed that the only one of these sections, which has any applicability to appellant's case, is section 1173, an inspection of which discloses that the Legislature retained the right of repealing, altering or modifying the charter of any bank and likewise retained the right of repealing, altering or modifying the *provisions* of chapter 47 of the Code of Virginia. Said section nowhere reserved to the Legislature the right of repealing, altering or modifying *charters granted by the Corporation and Circuit Courts under the provisions of section* 1145 *of said Code.* In order to vest in the Legislature this right the court must write into section 1173 the words "charters granted under" in front of the words "the provisions of chapter 47." The reservation of the right to repeal, alter or modify the PROVISIONS of chapter 47 does not give the right to alter or modify or amend a charter granted under those provisions.

Courts can not supply words in a statute where there is no ambiguity and the meaning of the language is plain.

> "The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions; and wherever the Legislature adopts such language in order to define and promulge their action or their will, the just conclusion from such a course must be, that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the Legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large."
>
> Maillard et als. v. Lawrence, 16th Howard, p. 261.

See also:—

U. S. v. Fisher, 2nd Cranch, p. 399.
Levey v. McCartee, 6th Peters, p. 102.
U. S. v. Weltberger, 5th Wheaton, p. 94.

This court said in the case of Denn v. Reives, 10th Peters, p. 527:—

> "Where the language of the act is not clear, and is of doubtful construction, a court may well look at every part of the statute, at its title, and the mischief intended to be remedied in carrying it into effect. But it is not for the court to say where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions."

When the meaning of a statute is plain, consequences and motives are not to be considered and though the literal interpretation may defeat the object of the act, still it must be adopted.

"It is better to abide by this consequence than to put upon it a construction not warranted by the words of the act in order to give effect to what we may suppose to have been the intention of the Legislature."

Lord Tenterden in King v. Barnham, 15th E. C. L., p. 157.

See also:—

St. Paul v. Phelps, 137 U. S., p. 528.
Bate v. Sulzberger, 157 U. S., p. 1.
Hadden v. Collector, 5th Wallace, p. 107.
Sturges v. Crownenshield, 4th Wheaton, p. 202.

Construing section 1173 of the Code of Virginia, in the light of these principles, demonstrates that section 1173, of the Code of Virginia, did not reserve to the Legislature the right to repeal, alter or modify appellant's charter.

Unless, then, there is some fact disclosed by the record in this

case, which takes it without the perview of the case of Dartmouth College v. Woodward *supra,* it seems to us that the action of the courts of Virginia, was in contravention of the Constitution of the United States.

Notwithstanding the general principle that the obligation of a contract, as set out in its charter of incorporation, can not be violated, still the courts have modified this doctrine, to the extent, that it does not deprive the State of any of its police power nor deprive it of the right of forfeiting a charter for misuser or non-user.

> "Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens and to the preservation of good order and the public morals. The Legislature can not, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."
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> Beer Co. v. Massachusetts, 97th, U. S., p. 33.

Under the police power of the State, had the charter of incorporation granted the privilege of selling liquors, this privilege could have been withdrawn without infringing on the doctrine laid down in the case of Dartmouth College v. Woodward, but such was not the case. The charter of incorproation of appellant does not give it the right to sell or distribute intoxicating liquors. The only chartered rights granted were, first, to promote social intercourse, athletics, physical culture and engage in all manly sports, and second, to hold or lease such real estate as shall be required for the purpose of said club, not to exceed the sum of $3,000. (See page 7 of the

Record). The right, therefore, of selling or distributing intoxicating liquors is not one of the contractural rights existing between the State and the members of said corporation. In order to sustain the decision of the Virginia State Courts, on the ground that the act of the Virginia Legislature, under which this proceeding was instituted, was a legitimate exercise of the Police Power of the State, this court must hold that, not only can the State prohibit under this power the performance of certain acts, the right to perform which is granted in the charter, but that it may go further, and as punishment for the doing of the prohibited act, forfeit all of the other rights granted in the charter, the prohibition of which is not within the police power.

The case at bar is even stronger. It will be observed that the privilege of selling intoxicating liquors was granted by a subsequent act of the Legislature. The rights thus conferred, might at any time, be withdrawn and the Legislature might have prescribed a fine or imprisonment for a misuse of this privilege, but the Legislature could not take away the contractual rights as set out in the charter of incorporation as a punishment for the misuse of this privilege when those contractual rights were perfectly innocent, not inhibited by the statute, nor even subject to inhibition by the Legislature.

> "The limit to the exercise of the police power in these cases must be this: The regulation must have reference to the comfort, safety or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short ,they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise."—Cooley's Constitutional Limitations, p. 710, Sixth Edition.
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> Washington Bridge Co. v. State, 18th Conn., p. 53.
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> Bailey v. Phila. R. R. Co., 4th Harr, p. 389.
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> State v. Noyes, 47 Me., p. 189.

Pingry v. Washburn, 1st Aiken, p. 264.
Miller v. New York & R. R. Co., 21 Barb., p. 513.
People v. Jackson & Michigan Plank Road Co., 9th Mich., 285–307.
Sloan v. Pacific R. R. Co., 61 Mo., p. 24.
Attorney–General v. Chicago & C. R. R. Co., 35 Wis., p. 425.

If this conclusion is not correct, then the Legislature may at any time destroy any charter by prohibiting some one power in the charter which is properly a subject of police regulation and imposing as a punishment the destruction of all the other innocent rights and thus do indirectly, what it can not do directly. Undoubtedly the contract evidenced in the charter may be forfeited like any other contract by non–user or mis–user, in regard to matters which are of the essence of the contract between the corporation and the State. Dartmouth College v. Woodward, 4th Wheaton, p. 658.

State v. Council Bluffs, 11th Neb., p. 356; 9th Northwestern, p. 564.
Commonwealth v. Commercial Bank, 28th Pa. St., p. 389.
Hodsdon v. Courtland, 16 Me., p. 314.

But this mis-user must be a mis–user or non–user of the rights granted in the charter, which was not the case with appellant. As far as the record shows there has been neither mis–use nor non-use of any contractual right granted in the charter of incorporation.

R. RANDOLPH HICKS,
Counsel for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 451.

THE COSMOPOLITAN CLUB,
Plaintiff in Error.

v.

THE COMMONWEALTH OF VIRGINIA.
Defendant in Error.

BRIEF OF WILLIAM A. ANDERSON, ATTORNEY-GENERAL, FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error was incorporated as a social club by a charter granted to it by the Corporation Court of the city of Norfolk on the 5th day of October, 1894, under the laws of the Commonwealth then in force.

Its charter will be found at pp. 7 and 8 of the Record.

It was thereafter organized and conducted as a social club in the city of Norfolk, where its domicile, under its charter, was.

The purpose for which the club was formed was defined in Article II, of its charter, as follows:

> "II. The purpose for which the said company is formed is to promote social intercourse, athletics and physical culture, and to encourage all manly sports; with the power to purchase, hold and dispose of real and personal property, to build and make improvements on its property and to do anything of any

other description that may come within the legitimate scope of its business."

It will be observed that its charter did not expressly, or by any implication, authorize this club to sell or dispense intoxicating liquors to its members or others.

Section 141 of chapter 20 of the Acts of the General Assembly of Virginia, approved February 19, 1904, contains the law of the Commonwealth regulating the sale of intoxicating liquors. So much of that statute as is pertinent to this case is as follows:

"Liquor license.

"141. No person, corporation, company, firm, partnership, or association shall, within the limits of this State, engage in the business of rectifying or of manufacturing or distilling malt or alcoholic liquors, other than wine, or sell, or offer to sell, by sample or representation or otherwise, wine, ardent spirits, malt liquors, or any mixture thereof, alcoholic bitters, bitters containing alcohol, or fruit preserved in ardent spirits, either by wholesale, retail, or to be drunk at the place where sold, or in any way, without first having obtained license therefor; nor shall the license confer the privilege of selling in any way, except in the manner hereinafter provided. And all mixtures, preparations, and liquids (except pure apple cider) which will produce intoxication shall be deemed ardent spirits within the meaning of this section. A license to sell by wholesale shall only include the privilege to sell in quantities of five gallons or more, except that wholesale dealers in malt liquors may have the privilege of selling by bottles and jugs in quantities of not less than one dozen to licensed retail dealers only. A license to sell by retail shall include only the privilege of selling in quantities not exceeding five gallons at any time to any individual, which shall include both the privilege of selling to be delivered to the purchaser in bottles, jugs, demijohns, or other vessels, and the privilege of being drunk at the places where sold. A license to keep an ordinary or hotel shall confer all the rights and privileges of a retail liquor dealer. Under a license to keep a malt liquor saloon, malt liquors, or any mixture thereof, may be sold to be drunk where sold, but shall not be taken away from the place of sale. Any person desiring to carry on the business of a wholesale liquor dealer, and also that of a retail liquor merchant, shall obtain a separate license for each and

comply with all the provisions of this section in relation to both privileges. A violation of the provisions of this section shall be deemed a misdemeanor, and shall be punished by a fine of not less than twenty dollars, and, in the discretion of the court, by imprisonment not exceeding twelve months: provided, that nothing in this section shall prevent wholesale confectioners from selling fruits preserved in ardent spirits, nor breweries from selling beer direct to consumers at their homes.

Licenses required by this section shall be obtained from the county, circuit, or corporation court of the county or city in which the business is to be conducted, except that the license to sell wine, ardent spirits, malt liquor, or any mixture thereof, by retail, upon any steamboat, canal boat, ship, barge, or other vessel at any wharf or landing, or upon any river, creek, sound, or any of the other waters of this Commonwealth (other than vessels regularly engaged in plying the waters of the Atlantic ocean), shall be obtained on the certificate of the county, circuit, corporation, or hustings court of some county or city within the limits and jurisdiction of which such steamboat, canal boat, ship, barge, or other vessel usually plies or is usually stationed, and the license to a sample liquor merchant shall be obtained on the certificate of circuit, corporation, or hustings court of some city of the State, but when so obtained the license shall carry the privilege of selling anywhere in the State, the clerk of the court granting the certificate to certify to the genuineness of the license under the seal of the court. Any person, firm, company, corporation, partnership, or association desiring to obtain a license such as is required in any of the cases specified in this section shall make a written application therefor to a commissioner of the revenue of the county or city from the circuit, county, or corporation or hustings court of which a certificate is required. Such application shall state the name of applicant, the residence of the applicant, the nature of the business for which the license is desired, the place where it is proposed to be prosecuted, and the amount required by law to be paid for the privilege of such license. Upon such application shall be endorsed the certificate of the treasurer of such county or city that the amount so required has been deposited with him by the applicant in gold or silver coin, United States treasury notes, or national bank notes.

"When such application has been endorsed by the commissioner of the revenue, 'Referred to the corporation court of the city of ————,' as the case may be, or when in towns of over five

hundred inhabitants, based on the last United States census, in which police protection is afforded, or when application is made by any person, partnership, or corporation owning or operating a hotel at a health resort having a natural mineral spring or situated by the sea or any large body of salt water connected therewith, or when such application is made for license to be exercised in any community in a county contiguous to a city, though such community be not incorporated, having on the fifteenth day of March, nineteen hundred and three, police protection paid for by the public, and wherein the court upon evidence is satisfied that there is within a radius of one-half of a mile of the place where such business is proposed to be conducted five hundred or more inhabitants, and wherein licenses for the sale of liquor have been granted during the twelve months next prior to the passage of this act: provided, that no part of any city or incorporated town or of any other county shall be included within such radius; or when any application for a license is made by any manufacturer or distiller of alcoholic liquors, such application has been endorsed by the commissioner of the revenue, 'Referred to the county court of ——————county,' until February first, nineteen hundred and four, and after that time it has been endorsed 'Referred to the circuit court of —————— county,' as the case may be, the applicant shall present the application so endorsed to the corporation, county, or circuit court whose certificate is required, and said court shall thereupon hear such evidence as may be introduced for or against the application and hear and determine the question of granting the same. It shall be lawful for any person who may consider that he would be aggrieved by granting such license to have himself entered and made a party defendant to said application and to defend and contest the same. If the court be fully satisfied, upon the hearing of the testimony for and against the application, that the applicant is a fit person to conduct such business, and that he will keep an orderly house, and that the place at which it is to be conducted is a suitable, convenient, and appropriate place for conducting such a business, the court may, upon the execution by the applicant of bond in the penalty of not less than two hundred and fifty nor more than five hundred dollars, with good security, conditioned for faithful compliance with all the requirements of this section, grant such license; and thereupon the commissioner of the revenue shall issue the same in such form as may be prescribed by the audi-

tor of public accounts. In case an application is refused by the court, the applicant shall have refunded to him by the treasurer or other collecting officer the amount of money deposited by him. In all cases except those in this section before provided for, when such application has been endorsed by the commissioner of the revenue, 'Referred to the county court of ——— county,' until February first, nineteen hundred and four, and after that time it has been endorsed, 'Referred to the circuit court of ——— county,' the applicant shall present the application so endorsed to the court whose certificate is required, and said court shall thereupon hear such evidence as may be introduced for or against the application, and hear and determine the question of granting the same: provided, however, that in all cases other than those hereinabove excepted, before any application for a license to sell by retail or to keep a malt liquor saloon or an ordinary shall be presented to any county court before the first of February, nineteen hundred and four, or to the circuit court after that time, the applicant shall, in addition to complying with all the other requirements of this section, first advertise his intention of making such application by posting a written notice of such intention at the front door of the courthouse of the county in which the business is proposed to be conducted, and also at the place where it is proposed to conduct the said business, for thirty days next preceding the day on which such application shall be presented to the said county court before the first of February, nineteen hundred and four, or to the circuit court after that time, and no court shall consider any such application until it shall have been first proved to its satisfaction that the notice required by this section has been so posted. It shall be lawful for any person who may consider that he would be aggrieved by the granting of such license to have himself entered and made a party defendant to said application and to defend and contest the same. If the court be fully satisfied upon the hearing of the testimony for and against the application that the applicant is a fit person to conduct such business, and that he will personally superintend the same, and will keep an orderly house, and that the place at which it is to be conducted is a suitable, convenient, and appropriate place for conducting such a business, and one at which police protection is afforded, and if it shall further plainly appear to the satisfaction of the court that a majority of the qualified voters of the district or town in which the privilege is sought to be exercised are in favor of the application, that the

sale of ardent spirits at that place will not be contrary to a sound public policy or injurious to the morals or the material interest of the community, the court may, upon the execution by the applicant of bond in the penalty of not less than two hundred and fifty dollars nor more than five hundred dollars, with security conditioned for the faithful compliance with all the requirements of this section, grant such license; and thereupon the commissioner of revenue shall issue the same in such form as may be prescribed by the auditor of public accounts. But if the court shall not be fully satisfied that all of the requirements of this section have not been complied with, it shall refuse to grant the license. Either party to such application shall, until the first of February, nineteen hundred and four, have the right to appeal from the order or judgment of the county court granting or refusing such application during the term at which the application is heard to the circuit court of said county. The judge of such circuit court shall take cognizance of such appeal, and may hear the same, either in term time or in vacation. And if he shall be clearly of opinion that all the requirements of this section have been fully complied with, may grant the license upon the terms herein prescribed; but if such requirements have not been fully complied with, he shall refuse the same, and the decision of such circuit court, or of the judge thereof in vacation, shall be final, and no appeal, writ of error, or supersedeas shall lie thereto. And after February first, nineteen hundred and four, there shall be no appeal from the order of the circuit court on such application. The party of any such proceeding who shall substantially prevail shall, in cases where such application are contested, be entitled to recover their costs from the opposite parties as in other civil cases. All bonds taken under this act shall contain the waiver of the homestead exemption of the obligors therein. In case an application be finally refused by the court, the applicant shall have refunded to him by the treasurer or other collecting officer the amount of money deposited by him: provided, however, that in any district in which a vote on the proposition of license or no license has been taken and decided affirmatively within the twelve months prior to the application, the court shall presume that the qualified voters are in favor of license: provided, however, that this section shall not be construed as repealing any special act prohibiting the sale or manufacture of ardent spirits in any county, district, or town: nor shall it be construed as allowing licenses to be granted in counties, districts, or towns dur-

ing such periods as, under the operation of the local-option statutes, the result of elections held thereunder is against the granting of licenses to sell liquor: and, provided further, that any person, firm, or corporation who has heretofore been licensed as a retail liquor dealer, and having on hand a stock of liquor purchased before the passage of this act, who is by the operation of this act prevented from obtaining a renewal of such license, shall have for the period of thirty days after the passage of this act the privilege of disposing of the said stock of liquor at wholesale without being required to take out additional license.

* * * * * * *

"The specific sum to be paid for the privilege of selling by retail wine, ardent spirts, malt liquors, or any mixture of any of them, in the county or in towns or villages of one thousand inhabitants or less, or upon any vessel, shall be one hundred and seventy-five dollars, or in cities or towns or villages exceeding one thousand inhabitants, three hundred and fifty dollars."

It will be seen that the above enactment was designed to regulate the entire subject of the liquor traffic in the State, and to prohibit that traffic under heavy penalties, unless it was conducted under licenses obtained in the manner prescribed by the statute.

There were certain social clubs in the State which desired to sell or dispense wine, malt liquors and other more or less intoxicating beverages to their members in the manner usual in such clubs.

To do this would have been under the provisions of section 141, a misdemeanor, rendering the persons who sold or dispensed such liquors liable to the penalties denounced by that section.

Therefore, to authorize such social clubs to conduct such a business, section 142, subsequently amended by chapter 116 of the Acts of 1904, was enacted by the General Assembly prescribing the terms and conditions upon which such clubs would be permitted to sell or dispense intoxicating liquors to their members, and is as follows:

"Social clubs.

"Sec. 142. (As amended by act approved March 12, 1904, Acts 1904, chapter 116.) Any corporation chartered and organized as a social club before the sixteenth day of April, nine-

teen hundred and three, not then subject to the license laws of this State, which shall desire to keep on hand at its club house or other place of meeting, wines, ardent spirits, malt liquors, or any mixture thereof, alcoholic bitters or bitters containing alcohol, or fruits preserved in ardent spirits, to be sold, directly or indirectly, or given away to the members of such corporation, shall, on or before the thirtieth day of April in each year pay to the treasurer of the county or corporation wherein the club house or other place of meeting of such corporation is located, a tax equal to two dollars for every person who has been a member of such corporation during the preceding year, but the tax shall be one-half of said amount when malt liquors only are sold or given away at such club: provided, the license tax to the State shall not in any case exceed three hundred and fifty dollars. Unless and until the said tax has been paid any person concerned in keeping such wines, ardent spirits, malt liquors, or any mixture thereof, alcoholic bitters, bitters containing alcohol, or fruit preserved in ardent spirits, and selling, directly or indirectly, or giving away the same, or any part of the same, to any member or members of such corporation, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than twenty dollars or imprisoned in jail not more than six months, or both.

"Any corporation chartered and organized as a social club, and paying the tax above described, shall be entitled to distribute and dispense wines, ardent spirits, malt liquors, or any mixture thereof, alcoholic bitters or bitters containing alcohol, or fruit preserved in ardent spirits, or malt liquors only, as the case may be, to and among its members, without obtaining any license or paying any other further tax, either State, municipal, or county, for the said privilege than is above described: provided, that the said corporation is organized and conducted as a bona fide social club; and provided, further, that no person or corporation shall be entitled by the payment of the tax above prescribed to conduct the business of a wholesale or retail liquor dealer for which a license is required under the existing laws of the State: provided, however, no such club shall hereafter be permitted or chartered in any county or district where local-option prevails.

"Upon complaint of any person that any such corporation so chartered as a social club is being conducted, or has been conducted, for the purpose of violating or evading the laws of this State regulating the licensing and sale of liquors, and after

service of such complaint on such corporation at least ten days before the hearing of said complaint, the circuit court of the county or corporation court of the city wherein is located its place of business or meeting, of the judge thereof in vacation, shall inquire into the truth of said complaint; and if the court, or judge in vacation, shall adjudge that the said corporation is being conducted, or has been conducted, for the purpose of violating or evading the laws of the State regulating the licensing and sale of liquors, the chartered rights and franchises of said corporation shall cease and be void without any further proceedings, and the said corporation and all persons concerned in the violation or evasion of said law shall be subject to the penalties prescribed herein.

"No corporation chartered and organized as a social club shall be entitled to the privileges of this act unless annually, on the first day of the term of the circuit court of the county before and nearest to the month of April for each year, and on the first day of the April term of the corporation court of the city wherein such club is, the president or secretary of such club shall exhibit in open court a list of the active members of such club on that day, and shall satisfy the court that such membership exceeds thirty bona fide members, and that such organization is a bona fide social club and not an organization created or conducted for the purpose of violating or evading the laws of this State regulating the licensing and sale of liquors; and the word 'members' wherever used in this act shall not apply to any person under the age of twenty-one years.

"No corporation chartered and organized under the laws of this State since the sixteenth day of April, nineteen hundred and three, or at any time under the laws of any other State, district, or county, shall be entitled to sell wines, ardent spirits, malt liquors, or any mixture thereof, alcoholic bitters, bitters containing alcohol, or fruits preserved in ardent spirits, by virtue of any of the provisions of its charter, but any such corporation desiring to engage in the sale of any of said liquors, or any mixture thereof, alcoholic bitters, bitters containing alcohol, shall, before so doing, first obtain a license for such privilege in the manner prescribed by section one hundred and forty-one, of an act of the General Assembly of Virginia, entitled 'an act to amend and re-enact sections seventy-five to one hundred and forty-seven, inclusive, of an act approved April sixteenth, nineteen hundred and three, entitled an act to raise money for the support of the government and public free schools,

and to pay the interest on the public debt, and to provide a special tax for pensions, as authorized by section one hundred and eighty-nine of the Constitution,' approved February ———, nineteen hundred and four.

"Any corporation so chartered and organized since the sixteenth day of April, nineteen hundred and three, violating the provisions of or failing to comply with the requirements of this section and section one hundred and forty-one of the acts aforesaid, shall, unless otherwise provided, be fined the sum of one hundred dollars, and upon conviction shall forfeit its charter and license, which forfeiture shall be adjudged by the court or a justice trying the case, with right of appeal from the judgment of the justice to the corporation court of the city or the circuit court of the county, as the case may be. Any officer, member, or employee of such last-mentioned corporation violating the provisions of, or failing to comply with the requirements of this section and section one hundred and forty-one, or either of them, shall be deemed guity of a misdemeanor, and be fined not less than fifty nor more than one hundred dollars for each offence, and in addition may be imprisoned not more than sixty days.

"Any officer, member, or employee of such last-mentioned corporation, who sells alcoholic or spirituous beverages of any kind or description on Sunday shall be guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred dollars nor more than five hundred dollars for each offence, and shall be imprisoned not less than fifteen nor more than sixty days in jail, and the charter and license of the corporation shall be declared forfeited, as hereinbefore provided. No license shall be granted to any such last-mentioned corporation to sell wine, ardent spirits, malt liquors, or any mixture thereof, alcoholic bitters, bitters containing alcohol, or fruits preserved in ardent spirits in any city, town, county, or magisterial district in which local-option prevails, or in which a dispensary has been established or license refused under section one hundred and forty-one aforesaid.

"No game of chance or slot machine shall be played, permitted, or kept in the club house of any such last-mentioned corporation, and the same shall be open to inspection by the police at any and all times. Any officer, member, or employee of any such last-mentioned corporation permitting any game of chance or slot machine to be played or kept at the club house of the corporation shall be fined not less than fifty nor more than

one hundred dollars for each offence, and may be imprisoned not more than sixty days and the charter and license of the corporation of which he is an officer, member, or employee, shall be forfeited as hereinbefore provided.

"When any such last-mentioned corporation is located in a city or town, it shall pay to the said city or town the same license tax for the conduct of its business that is paid by saloons in said city or town: provided, however, that any bona fide fraternal or benevolent association, society or lodge, well know and recognized as such in this State and other States, organized and existing in this State prior to the said sixteenth day of April, nineteen hundred and three, a subordinate division, branch, or lodge of which has been, or may hereafter be, chartered as a social club, association, or lodge, desiring to keep liquors at its club house or other place of meeting, to be sold or given away to the members of the corporation, shall be subject to those provisions of this act relating to social clubs chartered and organized prior to the said sixteenth day of April, nineteen hundred and three, and shall not be subject to the provisions of this act relating to social clubs chartered and organized since that date.

"All acts or parts of acts inconsistent with this act are hereby repealed."

This section 142 was in the nature of a proviso or exception to the general statute embodied in section 141, and made it lawful for any corporation chartered and organized as a social club before April 16, 1903, not then subject to the license laws of this State, to keep on hand at its club house or other place of meeting, and to sell, distribute, or dispense to its members, intoxicating beverages, but only upon compliance and performance by it of the terms and conditions distinctly prescribed in the act, and subject to the penalties therein set forth for any violation of those provisions.

The plaintiff in error is one of the social clubs which were chartered and organized before April 16, 1903.

There were two essential conditions upon compliance with which it, and any club of like character, could, without violation of the license and temperance legislation of the State, sell or dispense intoxicating liquors to their members, namely:

(1) That it should as a condition precedent to the exercise of such privilege, "on or before the 30th day of April in each year, pay

to the treasurer of the county or city in which the club house, or other place of meeting of such corporation is located, a tax equal to two dollars for every person who has been a member of such corporation during the preceding year, but the tax shall be one-half of said amount when malt liquors only are sold or given away at such club: provided, the license tax to the State shall not in any case exceed three hundred and fifty dollars."

(2) That on the 1st day of the April term of the Corporation Court of the city in which such club is, "the president or secretary of such club shall exhibit in open court a list of the active members of such club on that day, and shall satisfy the court that such membership exceeds thirty *bona fide* members, and that such organization is a *bona fide* social club, and not an organization created or conducted for the purpose of violating or evading the laws of this State regulating the licensing and sale of liquors."

It appears that the so-called social club, the plaintiff in error here, had at the time of its trial a membership of about 500, and had had as many as 1,000 members. So that the license or privilege tax which it was required to pay the State before selling liquors or wines to its members was $350.00. R. p. 7.

It would seem to have been quite a popular institution, and there is no evidence tending to show that it was a *bona fide* club, but the contrary.

The entrance fee for membership was only *ten cents,* and the dues *ten cents a month;* and its entire establishment seems to have consisted of a bar room and an office.

Two modes of procedure were provided by the statute for punishing or penalizing such a corporation, or any person concerned, in keeping and directly or indirectly selling or giving away such liquors for its violation.

The first of these was a prosecution of the corporation or "any person concerned in keeping such liquors and selling or giving away the same" for a misdemeanor, for which they would be liable to punishment by a fine of not less than twenty dollars, and a person other than the corporation, to imprisonment not more than six months, or both.

The second was a summary proceeding in the nature of a substitute for the proceeding by *quo warranto*, whereby the chartered rights and franchises of such corporation would be terminated, and annulled by the judgment of a court of competent jurisdiction.

This proceeding was, where upon complaint by any person that any such corporation so chartered as a social club, is being conducted, or has been conducted, for the purpose of violating or evading the laws of the State regulating the licensing and sale of liquors, after ten days' service of such complaint upon such corporation, the Circuit Court of the county, or the Corporation Court of the city in which such club is located, or the judge thereof in vacation, was required to hear such complaint and to inquire into the truth thereof; and if such court or judge adjudged that such corporation is being, or has been, conducted for the purpose of violating or evading the laws of the State regulating the licensing and sale of liquors, "the chartered rights and franchises of said corporation shall," in the language of the statute, "cease and be void without any farther proceedings."

Such a judgment involving a franchise, and a matter not merely pecuniary, would be subject to review, and if erroneous, to reversal in the Supreme Court of Appeals of the State, upon appeal to that tribunal. Section 3455 of Code of Virginia.

The Commonwealth adopted the second mode of procedure in this case.

The complaint was made by H. M. Boush, the chief of police of the city of Norfolk, and was embodied, in the language of the statute, in the notice given by the attorney for said city found at page 5 of the Record, which was given to, and duly served upon the Cosmopolitan Social Club on the 16th of June, 1906, informing the club that on the 30th day of that month the Corporation Court of that city, or the judge thereof in vacation, would inquire into the truth thereof.

On the 31st of July, 1906, the case was heard and tried by the Corporation Court of Norfolk city, when the Cosmopolitan Club appeared in court and moved to dismiss the complaint on the ground that:

(a) The court was without jurisdiction to entertain the same, because the statute under which said complaint was filed is in contravention of the Constitution of Virginia, and also in contravention of the Constitution of the United States; and

(b) That the court was powerless under the State and under the Federal Constitution to alter, repeal, amend or annul the chartered rights and franchises of said corporation, or to subject any person concerned in the violation or evasion of section 142 of the revenue law of the Commonwealth to the penalties prescribed in said statute.

The court overruled this motion and proceeded to try the case, whereupon it was proved that the Cosmopolitan Club occupied two rooms, a front office, and a bar-room—"a room equipped as a bar;"—that on the 8th of June, 1906, it sold a drink of whiskey from its bar to a certain Mr. Lyle, who took it to the front office and gave it to the witness, H. A. Davis, and that it sold a drink from its bar to said Lyle, who had a card which entitled him to the privileges of membership in said club for 30 days from June 1, 1906.

It was further proved by the man who was in charge of the club, that no one was allowed to get anything to drink in the club but members and guests of members, having membership cards, and that there had been originally one thousand of such cards, of which about 500 were left.

It was clearly inferrable from the evidence of the agent for the defendant in error that the converse of his statement was true, and that his so-called club sold drinks from its bar to its card members and their g...s.

The defendant in error introduced as evidence copies of its charter and by-laws.

Upon the case as thus presented, the trial court was of opinion that said corporation had been conducted for the purpose of violating and evading the laws of the State of Virginia regulating the licensing and sale of liquors, and pronounced its judgment, and entered its order accordingly, to which judgment and order application was first made by the defendant in error to the Supreme Court of Appeals of Virginia for a writ of error, which was refused, on the ground that

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the order of the Corporation Court of Norfolk City "was plainly right;" and from this order of the Supreme Court of Appeals of Virginia the case has been brought by writ of error to this court.

Where such a complaint as was made here, is made against any corporation chartered as a social club, and proof is made by the Commonwealth that such corporation is selling, or has sold, intoxicating liquors to its members or others, as was done in this case, it was, under the laws of Virginia, necessary for the corporation in order to meet such proof and exonerate itself from the charge to have shown two things:

First. That on the first day of the April term of the Corporation Court of Norfolk City, in the current license year, "the president or the secretary of such club" had exhibited "in open court a list of the active members of such club on that day," and had satisfied the court "that such membership exceeds thirty *bonda fide* members, and such organization is a *bona fide* social club, and not an organization created or conducted for the purpose of violating or evading the laws of this State regulating the licensing and sale of liquors."

In other words, it must show that it has complied with the express requirements of the statute, defining what is such a social club within its meaning, and that it is a *bona fide* social club.

For any club to engage in the business of selling or dispensing intoxicating liquors to its members without having first complied with this requirement of the statute, is itself a violation and evasion of the laws of the States regulating the licensing and sale of liquors. The defendant in error failed to prove that it had this certificate of character, or clear bill of health which the statute imperatively required that it should have.

Second. That on or before the 30th day of April, in the current license year, it had paid the license tax which the statute imposed as pre-requisite to the exercise of any such privilege. In this case such license tax was $350.00, and its payment as precribed was an essential condition and pre-requisite to the exercise of the privilege.

Here, again, the defendant failed to show that it had a license

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to sell liquors to its members, or had paid the tax without the payment of which any sale of liquors by it would be unlawful and criminal.

Its selling such beverages to its members without having paid such tax was in itself a violation and evasion of the laws of the Commonwealth regulating the licensing and sale of liquors.

It cannot be gainsaid that the burden of proving that it had complied with these essential requirements of the statute was upon the defendant in error, and that its failure to show its compliance therewith must be accepted in this case as conclusive that it had not done so.

The Commonwealth in such case is not required to prove a negative.

> "The rule established by the vast preponderance of authority is that, in cases where a license to sell, if produced and relied on, would constitute a complete defense to the action, the prosecution is not bound to produce any evidence in support of the negative allegation that the sale was made without license, but on the contrary the defendant must assume the burden of proving that he was duly licensed."
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> Black on Intoxicating Liquors, Section 507;
> Bishop on Statutory Crimes, Sections 1051, 1052;
> 1 Greenleaf on Evidence, Section 79;
> Wharton's Crim. Ev., Sections 331, 342.

The cases cited by these authors fully support the proposition stated, if indeed, it is not axiomatic.

The trial court was therefore constrained to accordingly adjudge that the so-called social club here had "been conducted for the purpose of violating and evading the laws of the State of Virginia regulating the licensing and sale of liquors."

The statute makes such an adjudication operate as an annulment of the chartered rihts and franchises of such a corporation, and it is this provision of the statute, and this effect of the judgment of the trial court, which is brought in question upon this appeal.

The only assignment of error is that:

"The Supreme Court of Appeals of the State of Virginia erred in holding and deciding that said clause 3, of said section 142, did not impair the obligation of a contract, contrary to the provisions of the Federal Constitution, article 1, section 10, for which errors defendant prays that the judgment of the Supreme Court of Appeals of Virginia, dated the 20th day of September, 1906, be reversed and a judgment entered for the defendant, the Cosmopolitan Club." R. p. 14.

I.

It was competent for the State to annul the charter and franchises of the corporation for "malfeasance, abuse, or misuse" of its franchises.

"From earliest times it has been established that a corporation which turned its liberties to improper purposes, and apparently if it even only neglected its duty, was liable to have those liberties forfeited."

Green's Brice's Ultra Vires, p. 786;
Mayor of London v. *Vanacre,* 12 Mod., p. 271;
Peter v. *Kendal,* 6 B. & C., p. 703;

And such is the established rule in this country.

Terret v. *Taylor,* 9 Cranch, p. 43.

"A private corporation created by the legislature may lose its franchises by a misuse or a nonuse of them; and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture." Id., p. 53.

Approved by this court in the opinion of Chief Justice Marshall in the Dartmouth College case, 4 Wheat., pp. 518-563, and in

Mumma v. *The Potomac Company,* 8 Peters, pp. 281-287.

"A corporation by the very terms and nature of its political existence is subject to dissolution by a surrender of its corporate franchises, and by a forfeiture of them for wilfully misuses, and nonuse."

Mr. Justice Story in Mumma v. *The Potomac Company, supra.*,

"A corporation may incur a forfeiture of its franchises by the doing of an illegal act. Any act of a corporation which is forbidden by its charter or by a general rule of law, and strictly, every act which the charter does not expressly or impliedly authorize the corporation to perform, is unlawful; and if the doing of such act is an injury to the public, it may be sufficient ground for declaring a forfeiture of the corporate franchises."

2 Morawetz on Private Corporations, Sec. 1024;
V. Thompson Commentaries on Corporations, Section 6609-6615.
New Orleans Water Works Company v. *Louisiana*, 185 U. S., pp. 336, 346-7;
Commonwealth v. *Union Insurance Co.*, 5 Mass., p. 230;
People v. *North River Sugar Refining Co.*, 121 N. Y., 582;
Eel River Company v. *State*, 155 Indiana, p. 456.

If it is competent for a State to annul the charter rights and franchises of a corporation of its creation, for nonuser, or for a misuser, which is simply illegal, how much more manifestly valid, justifiable, and necessary is the exercise of such a power by a State, where the "misuser" has been not only *unlawful*, but has been, as in this case, criminal.

II.

In the exercise of its police power, one of the attributes of sovereignity still remaining to the States, the State governments may regulate and control the manufacture and sale of ardent spirits within their territorial limits, may prohibit the same, and may make and punish infractions of their statutes in this behalf, as crimes, or by such penalties sanctioned by the law-making power of the State as may be appropriate to the end desired to be reached.

License cases, 5 Howard, pp. 504-631;
Mugler v. *Kansas*, 123 U. S., pp. 623, 658, 659, 664, 670 to 674.

The opinion of this court by Mr. Justice Harlan in *Mugler* v. *Kansas* would seem to be conclusive of this case.

The contention of the counsel for the plaintiff in error that the charter granted to, and accepted by the Cosmopolitan Club constituted a contract, which the State cannot annul or amend without the consent of the corporation, has no applicability to this case.

The Commonwealth did not charter the Cosmopolitan Club to sell whiskey. Nor did its charter give it any right to violate the civil law of the Commonwealth. Still less did its charter empower it to violate the criminal law of the State or make it immune from punishment if it did.

No charter could, and the charter of this corporation did not purport to, make the corporation superior to, or independent of, the law; but, under its charter it is subject and amenable to the law just as any natural person is.

IV.

"The violation by an incorporated social club of a law forbidding the sale of intoxicating liquors to its members is such an abuse and misuse of its charter powers and franchises as to furnish legal cause for the annulment of its charter."

The precise question in the concrete form in which it is presented in the case at bar, arose in *State of Maryland* v. *Easton Social, Literary & Musical Club*, 73 Md., p. 97, 10 L. R. A., p. 64, and the Court of Appeals of that State unanimously held as stated in the syllabus above quoted.

V.

No Federal question is presented in this case.

Upon this point the case is ruled by *New Orleans Water Works Company* v. *Louisiana*, 185 U. S., pp. 336, 346 to 350.

No question as to the legality of the mode of procedure was raised in the trial court or in the Supreme Court of Appeals of Virginia; but if such question had been so raised it must have been decided adversely to the plaintiff in error under the authority of *New Orleans Water Works Company* v. *Louisiana*, *supra*, and other

adjudications of this court, and would have presented no Federal question.

The decisions of the State Courts are final upon mere questions of procedure.

In *Kennard* v. *Louisiana ex rel Mayor*, 92 U. S., p. 48, cited in *Foster* v. *Kansas ex rel Johnston*, 112 U. S., pp. 201-206, and in *New Orleans Water Works Company* v. *Louisiana*, 185 U. S., pp. 336, 350,

> "it was held that a State statute regulating proceedings for the removal of a person from a State office was valid with regard to the Federal Constitution, if it provided for bringing the party proceeded against into court, notifying him of the case he had to meet, giving him an opportunity to be heard in his defense, and for the deliberation and judgment of the court."

It would be too late to raise such a question now; but, had the issue been made in the trial court, that *quo warranto* was the proper remedy for annulling the charter of a corporation which had misused or abused its franchises, and that such annulment could not be validly effected by a complaint made and prosecuted under section 142 of the Virginia Revenue Law, in the manner in which the Commonwealth proceeded in this case, a complete answer to such a contention would have been also furnished by the decision of this court in *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S., p. 351, where this court held:

> "With these principles in mind, we come to an examination of the questions raised by the plaintiff in error.
>
> "The answer to the first question, as to mandamus being the exclusive remedy for illegal rates, is that the State Court has otherwise construed the charter, and has held that mandamus is not the only remedy, but that the company was liable to be proceeded against by *quo warranto* at the suit of the State through its attorney-general. The claim that by so proceeding there is any impairment of the obligation of a contract by any subsequent legislation, or that there has thus been a deprivation of property without due process of law, or a denial of the equal protection of the laws, has no colorable foundation.

"An examination of this question, among others, was made by the State Court after full hearing by all the parties, and all that can possibly be claimed on the part of the plaintiff in error is, that such court erroneously decided the law. *That constitutes no Federal question.*"

A case more distinctly in point even than *State of Maryland* v. *Easton Social, Etc., Club, supra,* both upon the question here suggested, and upon the main question in the case at bar, was the case of *Eureka Club* v. *Commonwealth,* 105 Va., p. 564, decided by the Supreme Court of Appeals of Virginia in June, 1906, in which case that court affirmed the judgment of the Corporation Court of Roanoke City, which, upon a complaint filed by the Attorney for the Commonwealth for that city, alleging "that the Eureka Club was not being conducted as a *bona fide* social club, but for the purpose of violating and evading the laws of this State regulating and licensing the sale of liquors," after hearing evidence rendered judgment against said corporation, and "ordered that the chartered rights and franchises of said Eureka Club shall cease, and the same are hereby dereby declared void."

Thus the validity of the Virginia statute in question, both as to the legality of the mode of procedure under it, and as to the legal intendment and effect thereof, have been twice sanctioned by the Virginia Court of last resort, whose decisions are, under the adjudications of this court above referred to, final upon such questions and in all such cases.

WILLIAM A. ANDERSON,
Attorney-General for the Commonwealth of Virginia

November 27, 1907.